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No. 78-205

In the Supreme Court of the United States

OCTOBER TERM, 1978

GIFT WRAPPING & TYINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

MARK L. EVANS
General Counsel

HENRI F. RUSH
Associate General Counsel

JEROME NELSON
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

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1. In 1976 most eastern railroads filed with the Interstate Commerce Commission tariffs reflecting a rate increase on certain paper goods. The Commission suspended the increase and conducted a hearing. An employee board (Pet. App. A-1 to A-11) and then a Division of the Commission (Pet. App. A-11 to A-16) concluded that the increase was justified by cost considerations—Penn Central, for example, was not recovering its costs under the old rates—and by comparision with rates in the East on other paper articles.

Before the Commission, petitioner focused primarily on establishing that there were defects in the railroads' cost evidence, but it also argued that the rates violated the "fourth section" (49 U.S.C. 4), which ordinarily prohibits

a higher rate for the shorter haul than the longer haul over the same route. This latter argument—the sole basis now asserted for further review—appeared in the next to the last sentence of the argument in a 36-page petition for reconsideration. The Commission made no explicit finding on the issue, but it stated that arguments not discussed were found to be without merit (Pet. App. A-13).

In the court of appeals the government argued that departures from the long haul-short haul principle had been authorized by earlier, but still outstanding, Commission orders.[1] The court affirmed the Commission's order without opinion (Pet. 2).

Meanwhile, the rates were replaced by new tariffs reflecting another increase on the same goods. That increase (which was not suspended) is the subject of a new Commission proceeding involving petitioner and others. Docket 36817, *Paper Articles Between Points in Official Territory*. Petitioner has repeated and elaborated on its fourth section arguments in that case. The railroads have relied explicitly on the Commission's earlier orders as allowing departures from the fourth section; in addition, their brief in Docket 36817 states that they have filed precautionary applications for exceptions concerning the new rates on these paper goods.[2]

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[1] *Commodity Rates East of the Rocky Mountains*, 304 I.C.C. 535 (1958), modified, 329 I.C.C. 212 (1966). The latter opinion discusses an unreported 1960 order which "granted so-called outside-territory relief," allowing "higher rates from and to points in subterritories [named in the 1960 order] intermediate to the origin and destination subterritories * * *" (329 I.C.C. at 213 n. 2). The areas named in the 1960 order are "Official (eastern), Illinois Southern, Southwestern, and Western trunk line territories * * *."

[2] Docket 36817, Resp. Br. at 31-40.

2. There is no reason for the Court to review the fourth section question on the present record. The orders cited in note 1, *supra*, contain language to support the fourth section departures in this case. Furthermore, the reach of these orders and the accompanying fourth section issues are being explored by petitioner and the eastern railroads in the pending Commission proceeding dealing with new rates on the same paper goods.[3]

By comparison, the issue was not well developed on the present record. The fourth section argument was perfunctory and presented neither examples of the violations nor any showing of prejudice to particular shippers. Moreover, petitioner has asserted throughout the proceedings that "[t]he most important aspect of error" was an alleged lack of adequate findings on other issues (Ct. App. Reply Br. at 1). In these circumstances, the Commission and the court of appeals reasonably concluded that the issue did not warrant particular discussion. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, No. 76-419 (April 3, 1978), slip op. 31, 36.

Petitioner to the contrary (Pet. 10-12), this case poses no conflict with *Seaboard Allied Milling Corp.* v. *ICC*, 570 F. 2d 1349 (8th Cir. 1978), which involved a decision not to investigate under 49 U.S.C. 15(8) a rate that had been challenged on fourth section and other grounds. In the present case, the ICC opened an investigation under Section 15(8); petitioner's quarrel is with the outcome of the proceeding, not any refusal to institute one.

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[3] If the Commission should determine in the pending proceeding that the fourth section departures were not previously authorized, and that the rates are therefore unlawful, petitioner would be free to seek damages for any injury it has suffered by filing either an administrative complaint or a civil action. See 49 U.S.C. 8, 9.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARK L. EVANS
General Counsel

HENRI F. RUSH
Associate General Counsel

JEROME NELSON
Attorney
Interstate Commerce Commission

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